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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91164764
Party	Plaintiff Brink's Network, Incorporated
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Date	11/09/2009
Attachments	Reply Memo in Support of Opposer's Motion to Compel Discovery Deposition of Mr J Baxter Brinkmann.pdf ( 24 pages )(1032723 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

BRINK'S NETWORK, INCORPORATED	)	
	)	
Opposer	)	
v.	)	
THE BRINKMANN CORPORATION	)	Opposition No. 91164764
	)	
Applicant	)	

REPLY MEMORANDUM IN SUPPORT OF OPPOSER'S  
MOTION TO COMPEL DISCOVERY  
DEPOSITION OF MR. J. BAXTER BRINKMANN

I. INTRODUCTION

This matter is before the Board on the motion of Opposer, Brink's Network, Incorporated, to compel Applicant, The Brinkmann Corporation, to produce Mr. J. Baxter Brinkmann, President of Applicant, in response to Opposer's Notice of Taking Discovery Deposition and to supplement its discovery responses in response to the deficiencies raised by Opposer. On October 24, 2009, the Board entered an Order pursuant to Rule 2.120(e)(2) of the Trademark Rules of Practice that suspends proceedings pending disposition of Opposer's Motion to Compel. However, because that Order does not preclude the filing of any paper which is germane to the motion that precipitated the suspension, Opposer is entitled to submit this Reply Memorandum in support of its Motion.

II. ARGUMENT

The present motion seeks relief in the form of an Order directing Applicant: (1) to provide notice of at least three proposed dates for the deposition of Mr. Brinkmann to take place in Washington, D.C., and that the three proposed dates be within a four-week period following Applicant's notice; and (2) to supplement all deficient discovery responses within

two weeks following issuance of the Order as the responses to said deficiencies are required to proceed with the deposition of Mr. Brinkmann. Applicant has opposed the motion in all respects.

A. An Order Directing Mr. Brinkmann to Appear for a Deposition is Fully Warranted

Applicant contends that Opposer's motion to compel the discovery deposition of Mr. Brinkmann should be denied because Mr. Brinkmann never has "refused" to appear for his deposition. The factual record demonstrates otherwise. Mr. Brinkmann's conduct, namely, a pattern of intentional delay over a four-month period, is tantamount to a refusal to appear for a deposition. Nowhere in its Memorandum in opposition to this motion did Applicant point to a single date since May 28, 2009, on which it offered Mr. Brinkmann for a deposition. How can Applicant state, with a straight face, that it has been cooperative when it has refused repeatedly to respond to Opposer's requests for a date on which Mr. Brinkmann is available for his discovery deposition?

The record presented in support of this motion clearly shows that since May 28, 2009, Opposer contacted Applicant on numerous occasions to work out a mutually-convenient date for Mr. Brinkmann's deposition. It was Applicant's own counsel who acknowledged that Mr. Brinkmann refused to respond to inquiries about Mr. Brinkmann's availability for the deposition. And it was Applicant's counsel who strongly suggested that Opposer proceed to notice the deposition in order to get Mr. Brinkmann to take this matter seriously and provide his availability dates for the deposition that Opposer legally is entitled to take.<sup>1</sup>

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<sup>1</sup> See Declaration of Nancy S. Lapidus in Support of Opposer's Motion to Compel the Discovery Deposition of Mr. J. Baxter Brinkmann, ¶ 2, which was submitted with to Opposer's Motion to Compel.

Now Applicant attempts to blame Opposer for the delay in scheduling Mr. Brinkmann's deposition, contending that Applicant intends to take depositions at some point in the future and that it would be beneficial for both parties to schedule these depositions sequentially at a mutually convenient time. The "convenience factor" cited by Applicant is an after-the-fact argument, which should not permit Applicant to continue its charade. The equities of this situation dictate that Mr. Brinkmann be promptly produced for a discovery deposition regardless of any other deposition that may or may not take place in this proceeding and/or the location of any such deposition.

Applicant states that "Opposer cannot be heard to complain that Brinkmann [Applicant] is uncooperative merely because Mr. Brinkmann was not available on Opposer's unilaterally chosen dates of October 6 and October 14, 2009." (Applicant's Memorandum, p. 7.) The flaw in that argument is that Opposer did not file this motion merely because Mr. Brinkmann claimed not to be available on those two dates. Rather, Opposer filed the subject motion to compel because it has been requesting dates for Mr. Brinkmann's deposition since May 28, 2009, and Applicant has not yet offered one firm date on which Mr. Brinkmann is available.

The bottom line is that Opposer is entitled to take the discovery deposition of Mr. Brinkmann, and Opposer has demonstrated persistence and patience for more than four months with repeated requests to Applicant for availability dates. Applicant, however, has not provided even a single date on which Mr. Brinkmann is available. There is no credible position that Applicant can take to justify its conduct. In the absence of a Board Order compelling Applicant to provide dates for Mr. Brinkmann's deposition, Applicant will continue to shirk its obligations while making disingenuous declarations as to its "flexibility" and "cooperation."

The proposed location for the deposition in Washington, D.C. is justified in light of Applicant's pattern and practice of delay which is tantamount to a refusal to produce Mr. Brinkmann. Opposer's counsel is located in Washington, D.C. and Applicant's counsel also has an office in Washington, D.C. Opposer is located in Richmond, Virginia and Applicant is located in Dallas, Texas, both of which are approximately two hours from Washington, D.C. by train and plane, respectively. Therefore, the proposed location is reasonable and mutually convenient to both parties.

B. Applicant's Discovery Responses Remain Deficient And Opposer is Waiting for Supplemental Documents and Information from Applicant

Opposer acknowledges that Applicant produced certain documents in response to the subject motion on October 16, 2009<sup>2</sup> and October 19, 2009.<sup>3</sup> These two productions included Applicant's Verification of its First Amended and Supplemental Responses to Opposer's First Set of Interrogatories, which Opposer had requested on numerous occasions since Applicant served said Responses on February 15, 2007. If Opposer had not filed the present motion, there is little doubt Opposer still would be waiting for Applicant's verification of discovery responses served more than two and one-half years ago as well as other documents responsive to Opposer's discovery requests.

Applicant has agreed to produce two updated financial summaries "as soon as possible", but has not indicated when Opposer should expect to receive said summaries. In its opposing memorandum, Applicant states that the financial data previously provided is outdated due to the introduction of a new product subsequent to Applicant's original production. However, in Applicant's letter dated October 19, 2009, Applicant sets forth

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<sup>2</sup> A true and correct copy of Applicant's correspondence dated October 16, 2009 is attached as Appendix A.

<sup>3</sup> Applicant sent two letters to Opposer dated October 19, 2009. A true and correct copy of each letter is attached as Appendices B and C respectively.

additional reasons as to why the previously-produced financial data is inaccurate and must be updated, which do not relate to newly-introduced product lines.<sup>4</sup>

Opposer disputes Applicant's characterization of Opposer's discovery requests as improper. For example, Applicant has refused to supplement its responses to Opposer's Interrogatory Nos. 28 and 29 concerning Applicant's Registration No. 1,153,730 of the mark BRINKMANN on the ground that said registration is irrelevant to the claims and defenses in this proceeding. Applicant, however, specifically relies on Registration No. 1,153,730 as the basis for an affirmative defense set forth in ¶ 34 of its Answer to Opposer's Second Amended Notice of Opposition, Affirmative Defenses and Counterclaims, filed on August 26, 2009. Accordingly, Registration No. 1,153,730 is proper subject matter for Opposer's interrogatories and Applicant's refusal to supplement its responses is another example of a refusal to cooperate in discovery.

Concurrent with the filing of this Reply Memorandum, Opposer has responded to Applicant's letter of October 19, 2009, setting forth its position as to the propriety of its requests for supplemental information and documents.<sup>5</sup>

In light of Applicant's representations that it will provide updated financial data and pending a response from Applicant to Opposer's most recent correspondence dated November 9, 2009, renewing its request for supplemental discovery responses, Opposer withdraws its request for the Board to issue an Order requiring Applicant to supplement its discovery responses. However, Opposer reserves its right to re-file this motion to compel in the event that: (1) Applicant does not produce the updated financial data by November 30, 2009, or at least two weeks prior to the date on which Mr. Brinkmann's deposition is

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<sup>4</sup> See Applicant's correspondence to Opposer dated October 19, 2009, pp. 3-4, attached as Appendix C.

<sup>5</sup> A true and correct copy of Opposer's correspondence to Applicant dated November 9, 2009 is attached as Appendix D.


scheduled, whichever date is earlier, and/or (2) Applicant fails to respond to Opposer's letter dated November 9, 2009, or otherwise fails to satisfactorily supplement its responses to Opposer's discovery requests.

### III. CONCLUSION

For all of the foregoing reasons, Opposer's Motion to Compel Discovery Deposition of Mr. J. Baxter Brinkmann should be granted and Applicant should be directed to produce Mr. Brinkmann for a deposition at a mutually agreeable location in Washington, D.C., where Opposer's counsel is located.

BRINK'S NETWORK, INCORPORATED

Dated: November 9, 2009

By:   
\_\_\_\_\_  
Alan S. Cooper  
Nancy S. Lapidus  
Howrey LLP  
1299 Pennsylvania Avenue, N.W.  
Washington, DC 20004  
(202) 783-0800  
Fax: (202) 383-7195

Attorneys for Opposer

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing Reply Memorandum in Support of Opposer's Motion to Compel Discovery Deposition of Mr. J. Baxter Brinkmann was served on the following counsel of record for Applicant by depositing the same in the U.S. Mail, first class mail postage prepaid, this 9<sup>th</sup> day of November, 2009:

Gary Clark, Esq.  
Susan Hwang, Esq.  
Sheppard, Mullin, Richter & Hampton LLP  
333 South Hope Street, 48<sup>th</sup> Floor  
Los Angeles, California 90071

  
\_\_\_\_\_



# **APPENDIX A**

## **Reply Memorandum in Support of Opposer's Motion to Compel Discovery Deposition of Mr. J. Baxter Brinkmann**

***Brink's Network, Inc. v. The Brinkmann Corp.,  
Opposition No. 91164764***



333 South Hope Street | 48th Floor | Los Angeles, CA 90071-1448  
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Susan Hwang  
Writer's Direct Line: 213-617-4279  
[shwang@sheppardmullin.com](mailto:shwang@sheppardmullin.com)

October 16, 2009

Our File Number: OSEM-116943

***VIA E-MAIL AND FEDEX***

Nancy S. Lapidus, Esq.  
Howrey LLP  
1299 Pennsylvania Avenue, N.W.  
Washington, DC 20004

Re: TTAB Opposition Proceeding No. 91164764  
Brink's Network v. The Brinkmann Corporation

Dear Nancy:

With the FedEx<sup>®</sup> copy of this letter, we are forwarding Brinkmann's supplemental document production numbered BM 014902 – BM 017691. Documents designated "highly confidential" are produced pursuant to the terms of the Stipulated Protective Order. Please note that documents BM 015975 – BM 017691 are being produced as black and white copies. Color copies can be prepared if Brink's Network prefers them and will reimburse for the copying charges.

Brinkmann reserves the right to supplement its production should it identify any additional responsive documents.

Also enclosed is the verification for Brinkmann's First Amended and Supplemental Responses to Opposer's FIRST SET OF INTERROGATORIES.

Very truly yours,

Susan Hwang

for SHEPPARD MULLIN RICHTER & HAMPTON LLP

W02-WEST:LSH402269154.1

Encls.

### VERIFICATION

I, J. Baxter Brinkmann, do hereby declare:

I have read Brinkmann's First Amended and Supplemental Responses to Opposer's FIRST SET OF INTERROGATORIES and know its contents.

I am employed by The Brinkmann Corporation ("Brinkmann"), a party to this action, and am authorized to make this verification on its behalf. These responses are based upon information available to Brinkmann and its counsel. Based upon information and belief, the matters stated in these Responses are true.

To the extent that the responses require legal conclusions or the application of law to fact, I have relied on counsel for Brinkmann.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed in Dallas, Texas on the 27<sup>th</sup> day of August, 2009.

  
\_\_\_\_\_  
J. BAXTER BRINKMANN

# **APPENDIX B**

## **Reply Memorandum in Support of Opposer's Motion to Compel Discovery Deposition of Mr. J. Baxter Brinkmann**

***Brink's Network, Inc. v. The Brinkmann Corp.,  
Opposition No. 91164764***



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Susan Hwang  
Writer's Direct Line: 213-617-4279  
[shwang@sheppardmullin.com](mailto:shwang@sheppardmullin.com)

October 19, 2009

Our File Number: 0SEM-116943

***VIA E-MAIL AND FEDEX***

Nancy S. Lapidus, Esq.  
Howrey LLP  
1299 Pennsylvania Avenue, N.W.  
Washington, DC 20004

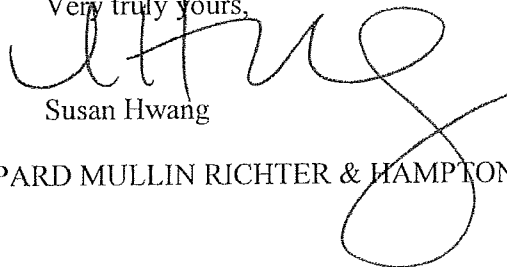
Re: TTAB Opposition Proceeding No. 91164764  
Brink's Network v. The Brinkmann Corporation

Dear Nancy:

With the FedEx<sup>®</sup> copy of this letter, we are forwarding Brinkmann's supplemental document production numbered BM 017692 – BM 018857. Documents designated "highly confidential" are produced pursuant to the terms of the Stipulated Protective Order. Please note that documents BM 017820 – BM 018857 are being produced as black and white copies. Color copies can be prepared if Brink's Network prefers them and will reimburse for the copying charges.

Brinkmann reserves the right to supplement its production should it identify any additional responsive documents.

Very truly yours,



Susan Hwang

for SHEPPARD MULLIN RICHTER & HAMPTON LLP

W02-WEST:LSH402272225.1

Encls.

# **APPENDIX C**

**Reply Memorandum in Support of Opposer's  
Motion to Compel Discovery Deposition of  
Mr. J. Baxter Brinkmann**

***Brink's Network, Inc. v. The Brinkmann Corp.,*  
Opposition No. 91164764**



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October 19, 2009

Our File Number: 0SEM-116943

***VIA E-MAIL***

Nancy S. Lapidus, Esq.  
Howrey LLP  
1299 Pennsylvania Avenue, N.W.  
Washington, DC 20004

Re: TTAB Opposition Proceeding No. 91164764  
Brink's Network v. The Brinkmann Corporation

Dear Nancy:

This letter is to address Mr. Brinkmann's availability for his deposition and Brink's Network's request for Brinkmann to further amend and supplement certain of its responses to Brink's Network's FIRST AND SECOND SET OF INTERROGATORIES, as detailed in your letters of August 25, 2009 and September 3, 2009.

A. Deposition Availability Dates

In your motion to compel you have requested availability dates for Mr. Brinkmann's deposition, and moreover for the deposition to be taken in Washington D.C. This is despite our repeated requests in our e-mails of August 27, 2009, September 3, 2009, September 28, 2009 and our letter of September 23, 2009 for availability dates of Broadview Security and Messrs. Chris Cage and Robert B. Allen, so that those depositions could be scheduled on the same trip to the Dallas, Texas area. We have not received any availability dates. Nor have we heard back from you on the availability of Hampton Products International Corporation and Messrs. Kevin Yocum, McAlister C. Marshall II and Nasser Chanda for their respective depositions. Moreover, your request that Mr. Brinkmann travel to Washington D.C. is contrary to the TRADEMARK RULES OF PRACTICE. *See* 37 C.F.R. § 2.120(b); TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE ("TBMP") § 404.03(a).

We reiterate our willingness to cooperate in scheduling Mr. Brinkmann's deposition with the other deponents in Texas and, in this regard, we look forward to hearing from you on availability dates. We also look forward to hearing from you on the availability of the other identified deponents.

B. Interrogatory Responses and Document Production

1. Production of Documents

You have requested confirmation that Brinkmann has produced all responsive documents to each Request in Opposer's FIRST AND SECOND SETS OF REQUESTS FOR PRODUCTION. After conducting a reasonable search and investigation of its records, Brinkmann believes it has produced all documents to date which are responsive to the requests, except for certain financial documents (please see discussion in Sections B.3-B.6). Please note that Brinkmann's investigations are still ongoing and discovery has not yet concluded. Brinkmann reserves the right to supplement its production should it identify any additional responsive documents.

2. Bates Numbering of Production Documents

You have requested supplemental responses to each of Opposer's Requests for Production and supplemental responses to each of Opposer's Interrogatories to identify the Bates numbers of the specific responsive documents. You allege that this is the "same request" that Brinkmann made of Brink's Network.

Contrary to your assertion, Brinkmann never made the "same request." First, Brinkmann notes that Brink's Network has provided Bates numbers in response to only four of Brinkmann's interrogatories, not all of them. Nor has Brinkmann requested or Brink's Network provided Bates numbers in response to each of Brinkmann's document requests.

Second, the Bates numbers provided by Brink's Network were provided because Brink's Network specifically chose to provide Bates numbers instead of written responses to Brinkmann's interrogatories. By way of example, Brinkmann's Interrogatory No. 6 requested that Brink's Network state the annual dollar amount of sales in the United States of the Brink's Products or Services under the Brink's Marks. Brink's Network, in its original response, did not provide a written description of the dollar amounts nor did it provide a chart or summary of the dollar amounts. Instead, Brink's Network merely responded that the information was contained in Brink's Network's annual reports. As you should recall, Brinkmann requested that Brink's Network supplement its response by providing the figures in the response directly, or providing Bates numbers of the specific pages of the annual reports. Brink's Network chose to supplement its response by providing the Bates numbers. Accordingly, this is not the "same request" that Brink's Network is making of Brinkmann, because Brinkmann has either provided written responses to the interrogatories which contain the information requested or provided a Bates numbered document which contains the information requested. Brinkmann will not provide Bates numbers for each interrogatory and each document request simply for the sake of providing them, which is unnecessary, unduly burdensome and unreasonable.



3. Interrogatory No. 7

You have requested that Brinkmann supplement its response to Interrogatory No. 7, which requested the annual dollar amount of revenues related to Brinkmann's sales of its home security products under the BRINKMANN mark. Specifically, you allege that the document Bates numbered BM 13005 and titled "Motion Sensitive Light Sales – Complete History through November 30, 2006" is "incomplete" because the title only references "Motion Sensitive Lights" rather than home security products. You have requested financial information about all the home security products identified in response to Interrogatory No. 6. You have also requested clarification about the figures contained in document BM 013005 and an update for the annual dollar amount of revenues of the home security products for the period 2007 to the present.

Please note that Brinkmann intends to produce an updated document that provides the requested information. First, your assumption that the original document BM 013005 is "incomplete" simply by sake of the title is incorrect. However, the document did not contain information about a particular home security product, the SL-8 Motion Activated Lighting System, which was introduced after document BM 013005 was produced. Second, the information provided was on a calendar year basis and Brinkmann is modifying document BM 013005 to present the information on a fiscal year basis. Finally, a question has been raised about the accuracy of BM 013005 because Brinkmann is involved in private labeling of products for certain retailers and some of the information contained in BM 013005 might have included sales data for private labeled products as opposed to BRINKMANN branded products. Accordingly, Brinkmann is working on updating the sales information, including sales information for 2007-2008, and will provide such information as soon as possible. Information for fiscal year 2009 is not yet available.

4. Interrogatory No. 8

You have requested that Brinkmann supplement its response to Interrogatory No. 8, which requested the annual dollar amount of revenues related to Brinkmann's sale of all products and services under the mark BRINKMANN for the past 15 years. Specifically, you have requested that Brinkmann update document Bates numbered BM 013006 and titled "The Brinkmann Corporation Net Sales – Fiscal Year 1992 through Fiscal Year 2006" to update it for fiscal years 2007-2009.

Please note that Brinkmann intends to produce an updated document that provides the requested information. Again, however, a question has been raised about the accuracy of BM 013006 because Brinkmann is involved in private labeling of products for certain retailers and some of the information contained in BM 013006 might have included sales data for private labeled products as opposed to BRINKMANN branded products. Accordingly, Brinkmann is working on updating the sales information, including sales information for 2007 to 2008, and

Nancy S. Lapidus, Esq.  
October 19, 2009  
Page 4

will provide such information as soon as possible. Information for fiscal year 2009 is not yet available.

5. Interrogatory No. 9

You have requested that Brinkmann supplement its response to Interrogatory No. 9, which requested the annual dollar amount spent by Brinkmann on advertising and/or promoting its home security products under the mark BRINKMANN. Specifically, you allege that the document Bates numbered BM 013005 and titled "Motion Sensitive Light Sales – Complete History through November 30, 2006" is "incomplete" because the title only states "Motion Sensitive Lights." For some reason, you appear to believe that the document BM 013005 does not contain information about the seven home security products identified in response to Interrogatory No. 6. You have also requested clarification about the figures contained in document BM 013005 and an update for the annual dollar amount spent on advertising and promotion for the home security products for the period 2007 to the present.

Brinkmann reiterates the comments made in Section B.3 above. Brinkmann is working on updating the advertising information, including advertising information for 2007 to 2008, and will provide such information as soon as possible. Information for fiscal year 2009 is not yet available.

6. Interrogatory No. 10

You have requested that Brinkmann supplement its response to Interrogatory No. 10, which requested the annual dollar amount spent by Brinkmann on advertising and/or promoting all goods and services under the mark BRINKMANN for the past 15 years. Specifically, you have requested that Brinkmann update document Bates numbered BM 013006 and titled "The Brinkmann Corporation Net Sales – Fiscal Year 1992 through Fiscal Year 2006" to update it for fiscal years 2007-2009.

Brinkmann reiterates the comments made in Section B.4 above. Brinkmann is working on updating the advertising information, including advertising information for 2007 to 2008, and will provide such information as soon as possible. Information for fiscal year 2009 is not yet available.

7. Interrogatory No. 12

You have requested that Brinkmann supplement its response to Interrogatory No. 12, which requested a description of the channels of trade for Brinkmann's home security systems and components sold under the BRINKMANN mark. Specifically, you have requested that Brinkmann update the Brinkmann Customer List (document labeled BM 013007 – 013037) to identify retailers that sell Brinkmann's home security products from 2007 to 2009.

Nancy S. Lapidus, Esq.  
October 19, 2009  
Page 5

Brinkmann is not required to supplement its document production. "The classes of customers for a party's involved goods or services are discoverable. In contrast, the names of customers constitute confidential information and generally are not discoverable, even under protective order." See TBMP § 414; *The J.B. Williams Co. v. Pepsodent G.m.b.H.*, 188 USPQ 577, 580 (TTAB 1975) (must identify class of customers who purchase products under mark, but not names of customers). Brinkmann's response already provided about the types of retailers that sell Brinkmann's home security products under BRINKMANN, which have not changed. The customer list was produced as merely an accompaniment to Brinkmann's response. Thus, Interrogatory No. 12 does not require supplementation, and Brinkmann is under no obligation to update its customer list.

8. Interrogatory No. 13

You have requested that Brinkmann supplement its response to Interrogatory No. 13, which requested a description of the purchasers and prospective purchasers for Brinkmann's home security systems and components sold under the BRINKMANN mark. Curiously, you state, "Applicant is in a much better position of understanding and explaining any information contained within BM 013007 – 013037, which purport to describe the purchasers and prospective purchasers of Applicant's BRINKMANN home security systems and components therefor."

Brinkmann has never "purported" that the Brinkmann Customer List (document labeled BM 013007 – BM 013037) describes the purchasers and prospective purchasers of Applicant's BRINKMANN home security products. Brinkmann produced that document in response to Interrogatory No. 12, which requested information about Brinkmann's channels of trade. Your statement, thus, is incorrect. Brinkmann understands "purchasers and prospective purchasers" to mean the end users of the home security products and in this regard, Brinkmann is not aware of any marketing or demographic studies identifying or describing the attributes or characteristics of purchasers and prospective purchasers of its identified products. Since the identified products are designed and intended for use in and around homes, Brinkmann believes that the purchasers and prospective purchasers of such products are primarily homeowners. Please confirm whether Brinkmann's understanding of "purchasers and prospective purchasers" comports with yours.

9. Interrogatory No. 14

Interrogatory No. 14 requested a description of any instances in which Brinkmann's use of BRINKMANN has resulted in actual confusion or mistake with respect to the source and/or sponsorship of Brinkmann's home security products. Brinkmann previously responded that it is not aware of any such instances. You have requested that Brinkmann confirm its response and document production.

Nancy S. Lapidus, Esq.  
October 19, 2009  
Page 6

Brinkmann's response has not changed, thus there is no need to amend or supplement its response. Brinkmann is not aware of any documents responsive to the interrogatory.

10. Interrogatory Nos. 16, 18 and 21

You have requested that Brinkmann supplement its responses to Interrogatory Nos. 16, 18 and 21, which requested that Brinkmann identify all documents upon which it intends to rely on to support the denials in paragraphs 20, 21 and 24 of Brinkmann's Answer to the Notice of Opposition.<sup>1</sup> Specifically, you have requested that Brinkmann confirm that all responsive documents have been produced and that Brinkmann provide the Bates numbers of the specific responsive documents.

Leaving aside the fact that Interrogatory Nos. 16, 18 and 21 are outdated<sup>2</sup>, Brinkmann stands by its original objections, which were entirely proper. "A party need not, in advance of trial, specify in detail the evidence it intends to present, or identify the witnesses it intends to call, except that the names of expert witnesses it intends to be called are discoverable." TBMP § 414; *Time Warner Entertainment Co. v. Jones*, 65 USPQ.2d 1650, 1657 (TTAB 2002) (interrogatory requesting that opposer "identify each and every fact, document and witness in support of its pleaded allegations" was equivalent to request for identification of fact witnesses

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<sup>1</sup> Interrogatory No. 16 requested identification of "all documents and tangible things upon which Applicant intends to rely to support the denial in ¶ 20 of its Answer of the allegation that Applicant's mark BRINKMANN, as used in connection with home security systems and components therefor, so resembles Opposer's previously used and/or registered marks as to be likely to cause confusion, to cause mistake or to deceive within the meaning of § 2(d) of the Federal Trademark Act."

Interrogatory No. 18 requested identification of "all documents and tangible things upon which Applicant intends to rely to support the denial in ¶ 21 of its Answer of the allegation that Applicant's use of the mark BRINKMANN in connection with home security systems and components therefor dilutes and/or is likely to dilute the distinctiveness of Opposer's famous mark BRINK'S within the meaning of § 43(c) of the Federal Trademark Act."

Interrogatory No. 21 requested identification of "all documents and tangible things on which Applicant intends to rely to support its denial in ¶ 24 of its Answer of the allegation that Applicant's use of the registration symbol ® in association with the mark BRINKMANN for home security systems and components therefor constitutes a misuse of the registration symbol in violation of § 29 of the Federal Trademark Act and deceives the consuming public into believing that the mark is registered."

<sup>2</sup> You have neglected to take into account that Brink's Network has filed a SECOND AMENDED NOTICE OF OPPOSITION, which changed the paragraph numbering in the original Notice of Opposition. Brinkmann's ANSWER TO THE SECOND AMENDED NOTICE OF OPPOSITION necessarily has different paragraph numbering as well, rendering Brink's Network's interrogatories technically outdated.

Nancy S. Lapidus, Esq.  
October 19, 2009  
Page 7

and trial evidence prior to trial, and therefore improper.”). Accordingly, Brinkmann does not need to supplement its responses.

11. Interrogatory Nos. 26 and 27 and Document Request Nos. 4 and 5

You have requested that Brinkmann identify the Bates numbers of the documents that demonstrate use of the mark BRINKMANN for home security systems and components in each of the categories described in subparagraphs (i) – (viii) of Brinkmann’s responses to Interrogatories Nos. 26 and 27. Brinkmann reiterates the comments made in Section B.2 above. Brinkmann has fully responded to Interrogatory Nos. 26 and 27 in its written response by listing the means by which Brinkmann uses BRINKMANN as a trademark. Brinkmann is not required to identify each Bates numbered document, which in addition to being unnecessary, is unduly burdensome and unreasonable.

12. Interrogatory Nos. 28 and 29

You have requested supplemental answers to Interrogatory Nos. 28 and 29 contained in Opposer’s SECOND SET OF INTERROGATORIES, which requested whether Applicant’s combined declaration of use and renewal for registration of Reg. No. 1,153,730 deleted certain goods. As made clear in Brinkmann’s objections to Interrogatory Nos. 28 and 29, the interrogatories are not relevant to the claims and defenses in this proceeding. “A party need not provide discovery with respect to those of its marks and goods and/or services that are not involved in the proceeding and have no relevance thereto.” *See* TBMP § 414; *Sunkist Growers, Inc. v. Benjamin Ansehl Company*, 229 USPQ 147, 149 n. 2 (TTAB 1985) (information regarding goods other than those in involved application and registration is irrelevant). Accordingly, Brinkmann does not need to supplement its responses.

13. Verification of Interrogatory Responses

You have requested verification of Applicant’s First Amended and Supplemental Responses to OPPOSER’S FIRST SET OF INTERROGATORIES and Applicant’s Supplemental Response to Opposer’s Interrogatory No. 22. With respect to verification of Applicant’s First Amended and Supplemental Responses to OPPOSER’S FIRST SET OF INTERROGATORIES, the verification was already sent to you by letter on October 16, 2009. With respect to Applicant’s Supplemental Response to Opposer’s Interrogatory No. 22, the Supplemental Response contained the verification, as is clearly shown by Mr. Brinkmann’s signature on page 8 of the Response. Please explain why you believe the Supplemental Response to Opposer’s Interrogatory No. 22 was not verified.

\* \* \* \* \*

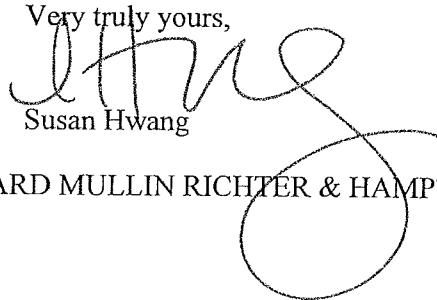
SHEPPARD MULLIN RICHTER & HAMPTON LLP

Nancy S. Lapidus, Esq.  
October 19, 2009  
Page 8

We look forward to hearing from you on availability dates for the depositions of Broadview Security, Hampton Products and the various Brink's Network and Broadview Security individuals.

Please contact us if you have any questions.

Very truly yours,

A handwritten signature in black ink, appearing to read 'SHWANG', with a large circular flourish at the end.

Susan Hwang

for SHEPPARD MULLIN RICHTER & HAMPTON LLP

W02-WEST:LSH402269565.1

cc: Gary A. Clark, Esq.

# **APPENDIX D**

## **Reply Memorandum in Support of Opposer's Motion to Compel Discovery Deposition of Mr. J. Baxter Brinkmann**

***Brink's Network, Inc. v. The Brinkmann Corp.,  
Opposition No. 91164764***

**Nancy S. Lapidus**

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November 9, 2009

Via E-mail

Confirmation Copy by US Mail

Susan Hwang, Esq.  
Sheppard, Mullin, Richter & Hampton LLP  
333 South Hope Street, 48<sup>th</sup> Floor  
Los Angeles, California 90071

Re: Brink's Network, Incorporated v. The Brinkmann Corp.  
Opposition No. 91164764, Our File No. 05666.0002

Dear Susan:

We are in receipt of your letter dated October 19, 2009, in response to our request for supplemental responses to Brinkmann's deficient discovery responses. Our comments with respect to the points raised in your letter are set forth below.

Interrogatory Nos. 7, 8, 9 and 10

We acknowledge Applicant's agreement to produce updated, accurate information in response to Opposer's Interrogatory Nos. 7, 8, 9 and 10. However, there is no indication as to the date on which Opposer should expect to receive this information. Please provide us with the requested information by no later than November 30, 2009. We advised you of the deficiencies in Applicant's responses to Interrogatory Nos. 7, 8, 9 and 10 on August 25, 2009. Therefore, we believe that a deadline of November 30, 2009 is reasonable.

Interrogatory No. 13

In Applicant's First Amended and Supplemental Responses to Opposer's First Set of Interrogatories, Brinkmann's answer to Interrogatory No. 13 described Applicant's purchasers and prospective purchasers of Applicant's home security systems and components therefor as follows: "[T]he consumers who shop at and purchase products through the channels of trade described in Response to Interrogatory No. 13 [sic] above are the purchasers and prospective purchasers of Brinkmann's products."

Opposer deems your letter of October 19, 2009, page 5, enumerated paragraph 8 to constitute a supplemental response to Interrogatory No. 13, which describes the purchasers and prospective purchasers of Applicant's home security systems and components therefor as "primarily homeowners." However, we request that this supplemental response be included in a formal supplemental answer to Interrogatory No. 13 signed in verified form by an officer of Applicant.



Susan Hwang, Esq.  
November 9, 2009  
Page 2

Interrogatory Nos. 28 and 29

It is impossible for us to understand the basis for your statement that Interrogatory Nos. 28 and 29 are not relevant to the claims and defenses in this proceeding. Brinkmann specifically relies on Registration No. 1,153,730 as the basis for an affirmative defense set forth in ¶ 34 of its Answer to Opposer's Second Amended Notice of Opposition, Affirmative Defenses and Counterclaims, filed on August 26, 2009. Accordingly, Registration No. 1,153,730 is proper subject matter for Opposer's interrogatories and Applicant's refusal to supplement its responses is yet another example of a refusal to cooperate in discovery.

Opposer reiterates its request that Applicant supplement its responses to Interrogatory Nos. 28 and 29 for the reasons stated previously. Opposer reserves the right to file a motion to compel in the event Applicant fails to fully supplement its responses to Interrogatory Nos. 28 and 29.

Sincerely,



Nancy S. Lapidus

NSL/Inf

cc: Kevin Yocum, Esquire